

May 11 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

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**ATTORNEYS FOR APPELLANT,
S. TUCKER JOHNSON**

FILED

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 09-0487

VALERIE EMMERSON,)

Petitioner and Appellant,)

vs.)

WALLACE C. WALKER and RANA)

RAE WALKER,)

Respondents and Appellees.)

WALLACE C. WALKER and RANA)

RAE WALKER,)

Third-Party Plaintiffs and Appellees,)

vs.)

S. TUCKER JOHNSON,)

Third-Party Defendant and Appellant.)

APPELLANT S. TUCKER
JOHNSON'S MOTION
TO STRIKE APPELLEES'
REPLY BRIEF

Respondents and Appellees Wallace C. and Rana Rae Walker raised one issue in their cross-appeal: “Whether the district court erred in refusing to consider Walkers’ claim against Johnson for punitive damages.” *See Appellee’s Opening Brief*, at 1. In their cross-appeal reply brief, Walkers raise arguments that are unrelated to their cross-appeal. Pursuant to Montana Rule of Appellate Procedure 12(3), the Walkers’ cross-appeal reply brief should be stricken, with leave to re-file a brief that is limited to new matter raised in Johnson’s Reply and Answer Brief.

Rule 12(3) states:

The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. The reply brief must be confined to new matter raised in the brief of the appellee. No further briefs may be filed except with leave of court.

(Emphasis added.)

Part I of *Appellee’s Reply Brief* argument is devoted to whether Valerie Emmerson breached the Walker/Emmerson Exchange Agreement, whether Tucker Johnson induced that breach, and whether Johnson tortiously interfered with the Walker/Emmerson Exchange Agreement. *See Appellee’s Reply Brief*, at 2-11. Those issues were not “presented by the cross-appeal.” *See* Rule 12(3), M.R.A.P.

In their cross-appeal, the Walkers merely stated – without any citation to the

record – that Johnson induced a breach of the Walker/Emmerson Exchange Agreement. *See Appellee’s Opening Brief*, at 44. In his response to the Walkers’ cross-appeal, Johnson did not raise any issues regarding whether the Walker/Emmerson Exchange Agreement had been breached. *See Appellant Johnson’s Reply and Answer Brief*, at 19-21. Johnson’s argument regarding whether a breach occurred was strictly confined to issues raised in Johnson’s appeal – not issues raised in Walkers’ cross-appeal. Johnson focused solely on the fact that the District Court did not abuse its discretion in finding that Johnson did not act with malice. *See id.*, at 19-21. Thus, the issue of whether the Walker/Emmerson Exchange Agreement was breached, as it relates to the Walkers’ cross-appeal, is a new issue.

The rules of appellate procedure require that a reply brief “be confined to new matter raised” by the other party. *See* Rule 12(3), M. R. App. P.; *see also Gliko v. Permann*, 2006 MT 30, ¶ 26, n. 2, 331 Mont. 112, 130 P.3d 155 (finding appellee’s motion to strike arguments raised for the first time in the reply brief “well-taken”); *Unified Indus., Inc. v. Easley*, 1998 MT 145, ¶¶ 27-28, 289 Mont. 255, 961 P.2d 100 (declining to address appellant’s argument that the elements of equitable estoppel were not met where appellant “waited until its reply brief on appeal” to make that argument); *Loney v. Milodragovich, Dale & Dye, P.C.*, 273 Mont. 506, 905 P.2d 158

(1995) (declining to address an issue presented for the first time in a reply brief).

Where arguments regarding issues that were not raised in an opening brief are asserted for the first time in a reply brief, this Court will strike the new arguments. *See, e.g., Kinsey-Cartwright v. Brower*, 2000 MT 198, ¶ 9, 300 Mont. 450, 5 P.3d 1026; *see also USX Corp. v. Liberty Mutual Ins. Co.*, 444 F.3d 192, 201-02 (3d Cir. 2006) (granting motion to strike portions of a cross-appellant’s brief that were “outside the scope of the cross-appeal” and noting that the Federal Rules of Appellate Procedure do “not allow the cross-appellant to use its reply brief as a sur-reply to the appellant’s opening brief”). The Walkers used their cross-appeal reply brief to have the last say about an issue that was not raised in their cross-appeal.

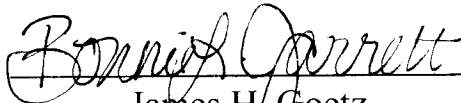
Johnson respectfully requests that this Court strike *Appellee’s Reply Brief* because it does not comply with Montana Rule of Appellate Procedure 12(3), and grant the Walkers leave to re-file a cross-appeal reply brief that is limited to the precise arguments made by Johnson in response to the Walkers’ cross-appeal within ten days. In the alternative, Johnson requests that the Court strike Part I of *Appellee’s Reply Brief*, and not consider those arguments, because those arguments were first raised in a brief that does not comply with Rule 12(3).

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DATED this 10th day of May, 2010.

GOETZ, GALLIK & BALDWIN, P. C.

By: 
James H. Goetz
Bonnie L. Jarrett

**ATTORNEYS FOR APPELLANT,
S. TUCKER JOHNSON**

CERTIFICATE OF SERVICE

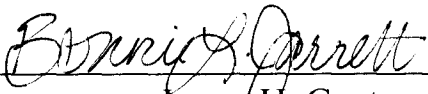
The undersigned hereby certifies that the foregoing document was served on the following counsel of record, by the means designated below, this 10th day of May, 2010.

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